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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74 - 5566

PEARL BARRETT,

Petitioner

-vs-

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

PROCEEDING IN FORMA PAUPERIS

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on October 18, 1974, which affirmed the criminal conviction of petitioner by the United States District Court, Eastern District of Kentucky, Jackson Division, whereby petitioner was found to have violated Title 18 U.S.C. Section 922(h) for having in his possession a firearm transported in interstate commerce subsequent to his previous felony conviction for housebreaking.

Opinion Below

The opinion of the United States Court of Appeals for the Sixth Circuit is printed herein as Appendix A. The order of the District Court judge for the Eastern Division of Kentucky, Jackson Division, and the verdict of guilty by the jury is reproduced herein as Appendix B.

JURISDICTION

The judgment of the United States District Court for the Eastern District of Kentucky, Jackson Division, was entered against petitioner on May 24, 1973 convicting him of receiving and possessing a firearm transported in interstate commerce, having been convicted of a felony, in violation of Title 18, Section 922(h), United States Code. The United States Court of Appeals for the Sixth Circuit affirmed the conviction on October 18, 1974, stating that there was no ambiquity in Section 922(h), and that the United States did not have to prove that petitioner himself was directly involved in the interstate transportation of the firearm. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and Part V of the Rules of this Court; and more specifically because the Court of Appeals has rendered a decision which is in conflict with other Courts of Appeals on the same matter, namely the Eighth Circuit Court of Appeals' decision in United States v. Ruffin, 490 F.2d 557 (8th Cir., 1974); and in addition, the decision in this matter is in conflict with the Supreme Court's finding in United States v. Bass, 404 U.S. 336 (1971).

QUESTIONS PRESENTED

1. Whether Title 18 U.S.C. Section 922(h) applies to petitioner who purchased a firearm in an intrastate transaction, and was not involved in any manner with the interstate transportation of said firearm.

2. Whether Title 18 U.S.C. Section 922(h) violates the Due Process Clause of the United States Constitution in that it did not require a showing of notice or knowledge on the part of the

petitioner of his statutory restriction against purchasing any firearm transported in interstate commerce.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment XIV Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATUTES INVOLVED

Title 18 U.S.C. Section 922(h)

It shall be unlawful for any person----

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

On or about the first day of April, 1972, petitioner Pearl Barrett bought a Smith and Wesson .38 caliber pistol from Larry D. Bates, the owner and operator of the Western Auto Store in Bonneville, Kentucky. Some time after that purchase, Barrett was stopped by the Owsley County, Kentucky Sheriff's Department for driving while under the influence of an alcholic beverage, and the firearm was discovered on the floor of his car and confiscated.

Subsequent to the arrest for drunk driving, a warrant was issued for petitioner's arrest for a violation of the Gun Control Act, and more specifically, Title 18 U.S.C. Section 922(h). Petitioner had been previously convicted of a felony in January, 1967, and Section 922(h) prohibits a convicted felon from possessing a firearm. Petitioner was then tried and convicted of this offense in the United States District Court for the Eastern District of Kentucky at Jackson on May 24, 1973. Prior to and during the trial, defense counsel moved to quash the indictment on the basis that petitioner had received, on June 20, 1969, by virtue of executive order of the Governor of Kentucky, a Restoration of All Civil Rights lost due to his felony conviction of January, 1967, but the trial court denied these motions.

This judgment was affirmed by the United States Court of Appeals for the Sixth Circuit, after oral argument, on October 18, 1974.

REASONS FOR GRANTING THE WRIT

Title 18 U.S.C. Section 922(h), the statute under which petitioner was charged and convicted prohibits one who has been convicted of a felony from possessing a firearm which has been shipped or transported in interstate commerce. The primary point of controversy in this case evolves about the interpretation of the statute with respect to the interstate commerce nexus which is an essential element of the crime. The Eighth Circuit Court of Appeals has held that the statute only speaks to those persons directly involved in the actual interstate transportation of the weapon, and does not reach those persons who ultimately come into possession of a weapon which had been previously transported in a transaction to which they were not a part. The Sixth Circuit Court of Appeals has stated essentially the same opinion in U.S. v. Craven, 478 F.2d 1329 (1973), but in the case now before the Court, the Sixth Circuit did not follow its earlier reasoning. This being the case, there now exists a conflict of opinions among the circuits, and though the Supreme Court has approached the problem in U.S. v. Bass, 404 U.S. 336 (1971), it has not yet spoken definitely regarding the reach of 922(h).

In addition, there exists a due process question of notice to those persons affected by the statute. No element of mens rea or scienter was required to be proven by the government at the trial, even in the face of testimony by the petitioner that he was not aware of the statute's prohibition. Petitioner's position was even stronger due to the fact that he had received what he believed to be a pardon from the Governor of Kentucky, which he felt had lifted the disabilities of his prior felony conviction, and thus in his own mind established the belief that he did not fall within a class of

persons designated as previously convicted felons. This set of circumstances raises a question as to whether the necessary criminal intent was present at the time the crime was allegedly committed.

Petitioner contends that the statute under which he was charged does not apply to him, and even assuming arguendo that it did, he had no notice of it nor did he possess the essential criminal intent to violate said statute.

With regard to all issues raised, the ruling below is in conflict with the applicable decisions of this Court concerning each issue raised.

I. WHETHER TITLE 18 U.S.C. SECTION 922(h) APPLIES TO PETITIONER WHO PURCHASED A FIREARM IN AN INTRASTATE TRANSACTION, AND WAS NOT INVOLVED IN ANY MANNER WITH THE INTERSTATE TRANSPORTATION OF SAID FIREARM.

Petitioner purchased the weapon in question in his home town of Booneville, Kentucky, from one Larry D. Bates, the owner and operator of the Western Auto Store from which the gun was bought. Mr. Bates was himself a resident of Booneville. The facts, at this point are clear: no element of interstate commerce has entered the transaction. It is only when the origin of the weapon is disclosed that interstate commerce becomes involved. At trial, the testimony indicated that Mr. Bates (our emphasis) had purchased the gun from the Western Auto Distributing House in Gastonia, North Carolina, (R. 40), and that the gun had been manufactured in Springfield, Massachusetts, (R. 52). At no time was any evidence introduced which implicated the petitioner in any direct interstate transaction. His purchase was a pure intrastate transaction, and as such, did not come within the purview of Title 18 U.S.C. Section 922(h), the statute under which he was charged.

This contention is directly supported by United States v. Bass, 404 U.S. 336 (1971). The defendant, Bass, was convicted of possessing firearms in violation of Section 1202(a)(1) of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, a statute quite similar to 922(h), under which petitioner Barrett was convicted. The Court, in explaining the consistencies between Title VII and Title IV, of which Section 922(h) is a part, stated:

> " . . . however, Title IV apparently does not reach possessions or intrastate (our emphasis) transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation."
>
> Id., at 342.

A title VII offense is made out if the firearm was pssessed or received "in commerce or affecting commerce," but this is not the case for a Title IV offense, as the Court so found. The Court based this opinion on the fact that Section 922(h) was a modified version of 15 U.S.C. Section 902(e) and (f), which in turn amended the first such statute, 52 Stat. 1250, 1251 (1938). The original statute contained a presumption that mere possession of a firearm was transported in interstate commerce. That presumption was struck down in Tot v. United States, 319 U.S. 463, 466 (1943), which was relied upon by the Court in Bass as the proper interpretation:

> "The Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate."

The Eighth Circuit Court of Appeals has ruled on this same issue in the case of United States v. Ruffin, 490 F.2d 557 (1974). In Ruffin, the defendants were charged, as was petitioner, under Section 922(h). The firearms involved had been shipped from Connecticut to Texas and were then stolen in Illinois some seven

months prior to the time they were found in defendants' possession. The Court concluded that:

> " . . . it is not sufficient under 922(h) for the government to prove that the firearm had at some remote time previously traveled in interstate commerce. As pointed out in Bass, Title IV is primarily concerned with the transportation, of firearms. Accordingly, for a receipt to be cognizable under 922(h), the government must show that at the time the gun was received it was part of an interstate transportation." Id. at 560.

This ruling is entirely consistent with what the Sixth Circuit labeled "dictum" in Bass. And the Sixth Circuit in an earlier decision held that:

> " . . . 18 U.S.C. Section 922(h) speaks only of receipt of firearms or ammunition in interstate transportations and does not concern possessions at all." United States v. Craven, 478 F.2d 1329, 1336 (6th Cir., 1973)

Both the holding in Ruffin and the holding in Craven supported petitioner's contention that he was not in violation of 922(h). No showing was made that petitioner was directly involved in the original transaction which brought the firearm into Kentucky. It was conceded that he was in possession of the weapon, but Bass, Ruffin and Craven have all held that this showing of possession only is not sufficient to justify a conviction.

But the Sixth Circuit's decision below which affirmed petitioner's conviction is in direct conflict, not only with Bass, and Ruffin, but with its own decision in Craven. No explanation is given for this inconsistency other than the Court's statement in its opinion that the language in Bass regarding Section 922(h) was "dictum." As to Craven the Court found that a second and more recent transportation of the firearm in interstate commerce was sufficient to support a conviction, but no such second transportation was evidenced in petitioner's case, and Craven should not have been distinguished away.

There thus appears to be not only a conflict among the Circuits as to the application of 922(h), but also an apparent inconsistency in the Sixth Circuits own rulings. At no time prior to petitioner's case had the mere possessor of a firearm, with no connection to the interstate transportation of said weapon, been held accountable under Section 922(h). Gun dealers were convicted under this section, United v. Day, 476 F.2d 562 (6th Cir., 1973), and those persons charged under Title 18 Section 1202(a), United States v. Bass, 404 U.S. 336 (1971), were also convicted but mere possession such as that of petitioner was generally accepted to be outside the scope of 922(h).

It is therefore submitted that the conviction by the trial court and the subsequent affirmation by the appellate court are in conflict with recent decisions, both of this Court and other appellate courts, and as such petitioner's conviction should be overturned.

II. WHETHER TITLE 18 U.S.C. SECTION 922(h) VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION IN THAT IT DID NOT REQUIRE A SHOWING OF NOTICE OR KNOWLEDGE ON THE PART OF THE PETITIONER OF HIS STATUTORY RESTRICTION AGAINST PURCHASING ANY FIREARM TRANSPORTED IN INTERSTATE COMMERCE.

Petitioner, by his own testimony at the trial, stated that he had no knowledge of the statutory restriction placed upon him by Title 18 U.S.C. 922(h) regarding the purchase of firearms. At the time of purchase he was not asked to sign the registration form #4473 required by the Government from anyone who purchases a gun. Had the seller presented him with this form, and had the petitioner signed it and thus lied about his prior conviction, the situation would be quite different.

Scienter has been determined not to be an element of this offense, U.S. v. Jones, 481 F.2d 653, (2nd Cir., 1973), but it

must be presumed that in each case the purchaser is given an opportunity to read the registration form and become aware of the various restrictions. If, given that opportunity, he claims not to have read or understood the form, he would not have an adequate defense. But surely, if one is not made aware of his legal incapacity, and no attempt at all is made to have him read and sign the registration form which applies, he cannot then be held liable for his ignorance. "The rule that 'ignorance of the law will not excuse' is deep in our law . . . On the other hand, due process places some limits on its existence. Engrained in our concept of due process is the requirement of notice." Lambert v. California, 355 U.S. 225, 228 (1957).

The Lambert case cited above is directly on point with the case at hand. In Lambert, the City of Los Angeles Municipal Code, Section 52.39 made it unlawful for any convicted felon to remain in Los Angeles for more than five days without registering. "No element of willfullness is by terms included in the ordinance nor read into it by the California court as a condition necessary for a conviction." Id. at 227. The facts, then, are almost identical to petitioner's situation. Defendant Lambert had no knowledge of the ordinance, yet was convicted under it. The Supreme Court stated the issue as such:

> "The question is whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge." Id., at 227

The Court stated that the conduct involved was "wholly passive," and the same can be said of petitioner Barrett's act----purchasing a firearm is, of itself, a passive act. It is only made offensive by statute; common sense would not determine this to be a criminal

act. The Lambert Court held that a conviction under these circumstances was completely invalid:

> "We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinanace can stand. As Holmes wrote in The Common Law, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear' . . . Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. "Id, at 229.

A few months prior to the decision in petitioner's case, the Sixth Circuit decided the case of United States v. Renner, 496 F.2d 922 (6th Cir., 1974). The facts in Renner concerned an individual who was charged with making false statements to the effect that he was not under indictment at the time he purchased a firearm. Renner himself believed the indictment had been dismissed, when in fact it had only been set aside with leave to reinstate. The appeal was based on the trial court's error in instructing the jury that lack of knowledge of the indictment at the time of receipt of the firearms was not a defense to a 922(h) violation.

Renner is similar to Lambert in that "except for the claim that Renner was under indictment at the time, his purchases of the handguns were entirely lawful." Id. at 924. Thus, the issue became whether scienter was an element of the offense stated in 922 (h). Id. at 924. Similarly, scienter becomes a primary issue in petitioner's case.

On June 20, 1969, Louis B. Nunn, then Governor of Kentucky, presented petitioner with an impressive-looking document which stated that he was restored to all civil rights lost as a consequence of his prior felony conviction. Petitioner felt that all

disabilities arising from his conviction had been expunged by virtue of this document. When he purchased the Smith and Wesson .38 caliber which is the basis for his conviction, in his own mind he did not believe himself to be a felon, as defined by 922(h). Assuming arguendo that he was aware of Section 922(h), he still was not aware that he, personally, was affected by that statute. On direct examination petitioner was asked (at page 66 of the trial record):

> Q. "Did you read that part, Mr. Barrett which states that, 'Whereas, it is represented to me that the conduct of Pearl Barrett has been of an exemplory nature and merits the restoration of all civil rights lost by reason of a felony.' Did you read that part?"
>
> A. "Yes, I did."
>
> Q. "What did you understand that to mean, Mr. Barrett?"
>
> A. "Well, I understood that all of my rights had been restored and I would be allowed anything that any other citizen would be allowed to have."
>
> Q. "Did you at the time that you made the purchase have any misgivings or any doubts about your right to own or possess a weapon?"
>
> A. "No, sir, I did not."

Petitioner clearly was under the impression that he was not a convicted felon in the eyes of the law by virtue of his document from the Governor of Kentucky. He stated under oath that he felt he had been restored to the status of an ordinary citizen. He was doing nothing which would be illegal for the ordinary citizen. His offense was not of the common law variety; rather, it was criminal only because made so by statute. No criminal intent existed. The petitioner was doing nothing which he could have reasoned to be wrong. He lacked the essential element of mens rea. As stated by Hon. Learned Hand in United States v. Crimmins, 123 F.2d 271, 272 (2nd Cir., 1941):

> "Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. That awareness is all that is meant by the mens rea, the 'criminal intent', necessary to guilt . . . "

Without question, defendant Barrett was clearly not aware of the facts which made his conduct criminal. He interpreted his pardon for what it was----a restoration of all rights lost by virtue of his conviction. He read that document by the words on its face, and had no supposition that it would be interpreted in any other manner.

The Supreme Court of California, in the case of People v. Vogel, 46 Cal.2d 798, 299 F.2d 850, 855 (1956) spoke to this issue of criminal intent, and the effect of statutory law upon it:

> "At common law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense . . . So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication."

Scienter and notice thus become intertwined. Petitioner first of all had no knowledge of the existence of the restriction in 922(h), and even had he known of it, he still lacked the necessary criminal intent to violate it. The Sixth Circuit, in deciding Renner, held:

> "In our opinion, in order to convict a person of an offense where being under an indictment is an element, it must be shown that the accused had knowledge of the indictment; without such a showing a serious question of due process would be involved." United States v. Renner, 496 F.2d 922, 926 (1974)

As to mens rea, Justice Brennan in the concurring opinion in United States v. Freed, 401 U.S. 601, 613 (1970), summed up what must be described as a basic premise of the criminal justice system:

> " . . . I think we must recognize, first, that the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

Petitioner's case varies from Lambert only in so far as the gun is concerned; notice is still a basic requisite to the offense Renner is different only to the extent that Renner was unaware of his legal condition subsequent to his "pardon"; but both of these instances involve a question of status as seen by the person committing the alleged illegal act. We strongly contend that Lambert and Renner directly apply, and that petitioner's right of due process was violated by his arrest and conviction, both of which were upheld by the Sixth Circuit Court of Appeals.

CONCLUSION

For the reason stated above, namely that Title 18 U.S.C. Section 922(h) does not apply to petitioner who had never been involved in the interstate transportation of the firearm in question, and that he had neither notice of the restriction imposed by said statute, nor the necessary criminal intent to violate it, certiorari should be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

PEARL BARRETT,

Petitioner

-vs-

THE UNITED STATES OF AMERICA,

Respondent

APPENDIX

APPENDIX A

No. 73-1872

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. PEARL BARRETT, *Defendant-Appellant.*	APPEAL from United States District Court for the Eastern District of Kentucky.

Decided and Filed October 18, 1974.

Before WEICK, EDWARDS and MCCREE, Circuit Judges.

WEICK, J. delivered the opinion of the Court, in which EDWARDS, J., joined. MCCREE, J. (pp. 9-12) filed a dissenting opinion.

WEICK, Circuit Judge. The indictment charged that appellant Barrett, having been convicted in the state court of a felony, housebreaking, knowingly received and had in his possession a firearm, towit, a .32 caliber Smith and Wesson revolver, which had been transported in interstate commerce, 18 U.S.C. § 922(h). He was tried and convicted by a jury and was sentenced to three years' imprisonment.

Barrett had purchased the revolver on April 1, 1972, in a Western Auto Store in Booneville, Kentucky. Western Auto Store had received the gun on March 5, 1972 from Gastonia, North Carolina.

About one-half hour after Barrett had purchased the revolver he was observed by two deputy sheriffs driving his automobile south of Booneville. After the officers chased his

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car a short distance he stopped, and they arrested him for driving while intoxicated. One of the deputies then noticed the firearm on the floor board on the driver's side of Barrett's car; it was loaded.

Barrett had been convicted previously on January 17, 1967, of the housebreaking charge, and was sentenced to two years' imprisonment. On June 20, 1969, after Barrett served his sentence, the Governor of Kentucky signed a partial pardon restoring Barrett only to his civil rights.

Barrett contended in the District Court and here that his purchase of the firearm from the dealer was an intrastate transaction, not within the scope of Section 922(h), and that, in any event the document which he received from the Governor of Kentucky constituted a full pardon and therefore his previous conviction had been wiped out.

I

THE STATUTE

Section 922(h) provides in relevant part:

> (h) It shall be unlawful for any person —
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

This section is part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968.

It would appear to us that under the Government's proof this statute has been literally complied with. The firearm indeed had been transported in interstate commerce, from North Carolina to Kentucky, less than one month before Barrett received it.

Barrett relies on dictum contained in the majority opinion in *United States* v. *Bass*, 404 U.S. 336 at 342-343 (1971). *Bass* involved a prosecution under Title VII of the Omnibus Crime Control and Safe Streets Act, while the prosecution in the present case was under Title IV of the Act. The dictum is as follows:

> . . . [H]owever, Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation.[10]

Footnote 10 reads as follows:

> Title IV, 18 U. S. C. §§ 922(g) and (h), is a modified and recodified version of 15 U. S. C. §§ 902(e) and (f) (1964 ed.), 75 Stat. 757, which in turn amended the original statute passed in 1938, 52 Stat. 1250, 1251. Each amendment enlarged the group of people coming within the Act's substantive prohibitions against transportation or receipt of firearms in interstate commerce. The wording of the substantive offense has remained identical, although the original Act had a provision that possession of a firearm "shall be presumptive evidence that such firearm or ammunition was shipped or transported or received [in interstate or foreign commerce]." That presumption was struck down in *Tot* v. *United States*, 319 U.S. 463 (1943), and the Court there noted:
>
> "[T]he Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate." *Id.*, at 466.
>
> While the reach of Title IV itself is a question to be decided finally some other day, the Government has presented here no learning or other evidence indicating that

> the 1968 Act changed the prior approach to the "receipt" offense. See, *e. g.*, S. Rep. No. 1097, 90th Cong., 2d Sess., 115 (1968). (404 U.S. at 343)

By reference to *Tot*, the complete sentence, of which the foregoing quotation is a part, is as follows:

> Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. (319 U.S. at 466).

The Court in *Tot* further said:

> The Government agrees that this construction is correct. (*Id.* at 466).

It therefore appears that the Government conceded that the construction of the statute by the lower courts was correct, and that the Supreme Court accepted the concession without discussion. In *Tot* all that the Court decided was that the presumptive provision in the Act was invalid.

In the present case the Government has made no such concession, and we are required to decide the issue. Footnote 10 in *Bass* recognized that "the reach of Title IV itself is a question to be decided finally some other day . . . ."[1]

It is our opinion that there is no ambiguity in Section 922(h) of the Act. It means exactly what it says.

Barrett did indeed receive a firearm which had been transported in interstate commerce. Such receipt violated the plain

[1] The dictum in *Bass* was discussed in our decision in *United States* v. *Craven*, 478 F.2d 1329, 1336 (6th Cir. 1973), where there had been a second and more recent transportation of the firearm in interstate commerce, which we held was sufficient to support a conviction under Section 922(h).

language of the statute. It was not necessary for the Government to prove that Barrett received the firearm from the common carrier.

II

THE PARDON

It will be noted that Section 922(h) contains no exemption for any one who has been pardoned.

Barrett in the District Court relied on the exemption contained in 18 U.S.C. § 1203 Appendix, which appears in 18 U.S.C. § 3331 to End, page 496, and reads as follows:

> § 1203 Exemptions
>
> This title shall not apply to –
>
> (1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and
>
> (2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

Section 1203 is part of Title VII of the Act and would not appear to apply to an indictment under Title IV of the Act. But if the exemption did apply, it would not help Barrett because the alleged pardon did not authorize him to receive the firearm.

The pardon reads as follows:

> To all to Whom These Presents Shall Come, Greeting:
>
> Whereas, It is represented to me that the conduct of PERRY BARRETT has been of an exemplary nature and merits the restoration of all civil rights lost by reason of conviction of a felony.
>
> Now Know Ye, That in consideration of the premises

and by virtue of the power vested in me by the Constitution, I do hereby grant unto the said PEARL BARRETT

ALL THE RIGHTS OF CITIZENSHIP

denied him in consequence of said judgment of conviction. and I direct that all officers of this State respect this restoration.

In Testimony Whereof, I have caused these letters to be made patent and the seal of the Commonwealth to be hereunto affixed. Done at Frankfort, the 20th day of June in the year of our Lord one thousand nine hundred and 69 and in the one hundred and 78th year of the Commonwealth.

[SEAL] /s/ Louie B. Nunn
By the Governor

All that the pardon purported to do was to restore "all civil rights lost by reason of conviction of a felony."

Section 77 of the Kentucky Constitution provides:

> He [the Governor] shall have the power to . . . commute sentences, grant reprieves and pardons, except in case of impeachment.

In *Herndon* v. *Commonwealth*, 105 Ky. 197 at 200 (1899), the Court quoted the following language taken from *Mount* v. Com., 2 Duv., 93, with respect to a Section 77 pardon:

> The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more.

The civil rights to which Barrett was restored by the pardon were the right to suffrage provided for in Section 145 of the Kentucky Constitution, the right to hold public office as provided in Section 150 of the Constitution, and the right to serve on a jury, provided in K.R.S. 29.025. These constitutional and

statutory provisions expressly state that their civil rights are restored by the pardon.

The differences between a pardon merely restoring civil rights and a pardon relieving a convict of the penalty are pointed out in *Arnett* v. *Stumbo*, 287 Ky. 433, 435-436, 153 S.W.2d 889 (1941), where the Court stated:

> It will be perceived that persons losing their right of citizenship whereby they become disqualified to exercise the right of suffrage under the voters section "may be restored to their civil rights by executive pardon"; whilst the disqualification to seek and hold office under the office holding section "may be removed by pardon of the governor." There is no language in either of those sections expressly, inferentially or otherwise touching or dealing with a cancellation by any chief executive of the corporal punishment inflicted upon a convict for violation of any criminal law, the power to grant which is contained in Section 77 of our Constitution. The executive clemency provided for by both of the sections referred to (145 and 150) goes no farther than to permit the chief executive to restore lost rights of citizenship to the one convicted so that he might thereafter possess such rights as though no conviction had ever occurred. The rights so lost pertain exclusively to participation in the selection and the holding of a public office in the Commonwealth each of which is taken away by the sections of the Constitution referred to, but which may be restored by executive clemency as therein provided. Clearly, therefore, such restoration relates solely to the qualifications of voters in this Commonwealth and to the qualifications of those who seek and obtain public office within it.

The Court further said:

> . . . [The Governor] is expressly authorized by the sections referred to [Secs. 145 and 150] to lift the disabilities prescribed in them from the shoulders of the convict and to restore him to full and complete rights of citizenship. Such authority is in addition and supplemen-

> tary to the strict pardoning power provided for by Section 77 of the same instrument. (257 Ky. at 437).

In *Illinois Cent. R.R.* v. *Bosworth*, 133 U.S. 92, 103 (1890), the Supreme Court stated the effect of a full pardon:

> In the opinion of the court in the case of *Ex parte Garland*, 4 Wall. 333, 380, the effect of a pardon is stated as follows, to wit: "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. . . ."

In 67 C.J.S., *Pardons*, § 1(b), at 562-563, the several kinds of pardons are discussed:

> There are several kinds of pardons; thus a pardon may be full or partial, absolute or conditional. A pardon is full when it freely and unconditionally absolves the person from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided; it is partial where it remits only a portion of the punishment or absolves from only a portion of the legal consequences of the crime. (Footnotes omitted).

It is clear to us that the pardon in the present case was not a full pardon, but only a partial pardon. There was no remission of guilt, nor of the penalty. The only thing accomplished by the pardon was a restoration of civil rights under Kentucky law.

The rule of *United States* v. *Renner*, 496 F.2d 922 (6th Cir., 1974), should be confined to the facts of that case. The present case involved a question of Kentucky law relating to pardons, and appellant is bound by Kentucky law.

Affirmed.

McCREE, Circuit Judge (concurring in part and dissenting in part). I concur in that part of the court's opinion holding that appellant cannot avail himself of the exemption contained in 18 U.S.C § 1203 Appendix, but only because that exemption is not available to a defendant tried for violation of 18 U.S.C. § 922(h). That exemption applies only to convicted felons charged with receipt of firearms contrary to 18 U.S.C. § 1202. Appellant was indicted under a similar statute, 18 U.S.C. § 922(h), also for receipt of a firearm. The exemption applicable to this offense, provided for in 18 U.S.C. § 925, requires a convicted felon who desires to acquire a firearm contrary to the provisions of § 922(h) to secure the express permission of the Secretary of the Treasury, not a gubernatorial pardon.

I respectfully dissent from that part of the court's opinion holding that the government established that appellant's purchase of the gun from a local dealer satisfied the interstate commerce requirement of 18 U.S.C. § 922(h). In *Tot* v. *United States*, 319 U.S. 463 (1943), the Supreme Court was presented with two cases that required it to construe and to determine the validity of the predecessor statute to section 922 which provided:

> It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, in violation of this Act. *Id.* at 464, *quoting* C. 850. 52 stat. 1250, 1251; 15 U.S.C. § 902(f).

The Supreme Court observed in its opinion that two federal courts of appeals, including this court, had held that "the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not

extend to the receipt, in an intrastate transaction, of such articles which at some prior time, have been transported interstate." *Id.* at 466. The Court adopted this construction as authoritative in order to determine the validity of the presumption that Congress had created in the second portion of the statute. It invalidated the presumption because there was "no rational connection between the fact proved [possession] and the ultimate fact [receipt in an interstate transaction] presumed. . . ." *Id.* at 467. Possession of a gun, the Court held, afforded "no reasonable ground for a presumption that its purchase or procurement was in interstate rather than intrastate commerce." *Id.* at 468. Because the Supreme Court in *Tot* authoritatively construed § 2(f) of the Federal Firearm Act, the predecessor to section 922(h), I believe that the phrase in section 922(h), "which has been shipped or transported in interstate or foreign commerce," must be construed in the same manner as the identical phrase, "which has been shipped or transported in interstate or foreign commerce," of section 2(f). Accordingly, I would hold, as the Supreme Court did in *Tot*, that the mere shipment of a weapon in interstate commerce at some time before purchase in an intrastate transaction is an insufficient nexus with interstate commerce to satisfy the requirements of section 922(h).

In *United States* v. *Bass*, 404 U.S. 336 (1971), the Supreme Court reiterated that it had construed authoritatively section 2(f) in *Tot* and stated that section 922(h) "apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation." *Id.* at 342-43. In *Bass*, the Court, in construing 18 U.S.C. § 1202(a), concluded that with respect to that statute "the Government meets its burden . . . if it demonstrates that the firearm received has previously traveled in interstate commerce," and observed that "this reading preserves a significant difference between the 'receipt' offenses under Title IV [containing section 922(h)] and Title VII [containing section 1202

(a)]." *Id.* at 350, & n. 18. Moreover, the Court observed that the government had not demonstrated that Congress, in enacting section 922(h) in 1968, in language identical to that of section 2(f) of the Federal Firearms Control Act, had intended to change and broaden its earlier construction of this language in *Tot*. The government has also failed to offer in connection with this appeal any proof of a Congressional change of intent.

Not only has the Supreme Court indicated that the "receipt" offense of section 922(h) is more limited than that defined by section 1202(a), but also this court has adopted a similar construction. In *United States* v. *Craven*, 478 F.2d 1329 (6th Cir.), *cert. denied*, 414 U.S. 866 (1973), *reh. denied*, appellant contended that the government had failed to demonstrate receipt in violation of section 922(h). We observed that the Supreme Court's interpretation of the interstate character of the receipt requirement in *Bass* "comport[ed] with the accepted interpretation of the predecessor statutes of § 922(h)," and "conclude[d] that 18 U.S.C. § 922(h) speaks only of the receipt of firearms or ammunition in interstate transportations and does not concern possessions at all." *Id.* at 1336. Applying this test, we affirmed the conviction because within a few days after the theft of a police officer's gun in Ohio, appellant was found in possession of it in Kentucky.

Finally, in *United States* v. *Ruffin*, 490 F.2d 557 (8th Cir. 1974), not cited by either party to this appeal, the court held that "for a receipt to be cognizable under § 922(h), the government must show that at the time the gun was received it was *part* of an interstate transportation." *Id.* at 560. Accordingly, when the evidence showed only that a gun, found in appellant's possession in Missouri, had been stolen seven months earlier in Illinois from an interstate common carrier, appellant's conviction had to be reversed. The evidence was deemed insufficient to show that receipt of the gun was part of an interstate transportation.

When the Supreme Court authoritatively construes a statute, and Congress preserves its original language in enacting suc-

cessor statutes, I believe that the scope of the statute's prohibition remains the same, in the absence of evidence that Congress intended identical language in a successor statute to mean something different from its meaning in the original statute. In this case, appellant's purchase of the weapon was a purely intrastate transaction even though the gun had once been shipped in interstate commerce from the manufacturer to the dealer where it came to rest before it was sold to appellant. This evidence is insufficient to demonstrate the connection with interstate commerce required by 18 U.S.C. § 922(h). Accordingly, I would reverse appellant's conviction.

APPENDIX-B

District of Kentucky
FILED
MAY 25 1973
AT JACKSON
DAVID T. McGARVEY
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON

CRIMINAL NO. 10,339

UNITED STATES OF AMERICA — PLAINTIFF

VS

PEARL BARRETT — DEFENDANT

ORDER

On May 24, 1973 came the United States by Assistant United Attorney, Eldon Webb, the defendant in person and his attorney, Harold Garland Wells, and the jurors present as on May 23, 1973.

On motion of counsel for the defendant the rule as to separation of witnesses was invoked and all witnesses were excluded from the courtroom with the exception of Agent Walter Huffman, who was allowed to remain at counsel's table to assist the United States in the presentation of the case.

Mr. Webb read the Indictment to the jury and made an opening statement on behalf of the United States. Mr. Wells reserved an opening statement for the defendant.

The introduction of evidence on behalf of the United States was begun and concluded.

The hour for noon recess having arrived, the Court admonished the jurors and a recess until 12:30 P. M. was announced.

Following the recess came the United States attorneys, the defendant, his attorney in the absence of the jury and testimony was had on behalf of the defendant.

Later, the jury returned into open court and Mr. Wells made an opening statement on behalf of the defendant.

Thereupon evidence on behalf of the defendant was introduced and concluded.

Closing arguments were made to the jury by Mr. Wells for the defendant and by Mr. Webb for the United States.

The Court instructed the jurors and after the discharge of

Later, the jury returned into open court and in the presence of the attorney for the United States, the defendant, his attorney reported its verdict to-wit:

"We, the Jury, find the defendant Guilty

May 24, 1973 /s/ Chas H Tirey
(Foreman)"

Thereupon the Court inquired of counsel for the United States and counsel for the defendant if there was any question as to the form of the verdict, and counsel for both the plaintiff and the defendant having answered in the negative, thereupon the jury was discharged.

It was ORDERED that sentencing be deferred until June 11, 1973 at 9:30 A. M. at PIKEVILLE and the defendant's bond is to remain in full force and effect for appearance at Pikeville on June 11, 1973.

May 24, 1973

H. David Hermansdorfer, JUDGE

Copies: U. S. Attorney
5/25/73 Harold Garland Wells
mm

APPENDIX C

IN THE NAME AND BY THE AUTHORITY OF THE

COMMONWEALTH OF KENTUCKY

LOUIE B. NUNN

GOVERNOR OF THE COMMONWEALTH OF KENTUCKY

To all to Whom These Presents Shall Come, Greeting:

Whereas, It is represented to me that the conduct of PEARL BARRETT has been of an exemplary nature and merits the restoration of all civil rights lost by reason of conviction of a felony.

Now Know Ye, That in consideration of the premises and by virtue of the power vested in me by the Constitution, I do hereby grant unto the said PEARL BARRETT

ALL THE RIGHTS OF CITIZENSHIP

denied him in consequence of said judgment of conviction, and I direct that all officers of this State respect this restoration.

In testimony whereof, I have caused these letters to be made patent and the seal of the Commonwealth to be hereunto affixed. Done at Frankfort, the 20TH day of JUNE in the year of our Lord one thousand nine hundred and 69 and in the one hundred and 78TH year of the Commonwealth.

Louie B. Nunn
By the Governor

Elmer Begley
Secretary of State
By Mary R. Galey
Assistant Secretary of State